CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session

March 7, 2003

Call to order: Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:55 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners Sheridan Downey, Thomas Knox and Gordana Swanson were present.

Item #1. Approval of the Minutes of the January 17, 2003, Commission Meeting.

Commissioner Swanson asked that the first paragraph of the minutes indicate that she was not present at the meeting because her plane did not land in Sacramento.

There being no objection, the minutes were approved as amended.

Item #2. Public Comment.

There was no public comment regarding matters not on the agenda.

Item #3. Adoption of Amendments to Regulation 18313 –Forms and Manuals.

There were no comments from the Chairman, Commissioners or the public.

Chairman Getman moved to adopt amended regulation 18313.

Commissioner Downey seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

Item #4. Adoption of Amendments to Regulation 18225.7 - Expenditures "Made At the Behest Of" a Candidate or Committee; Adoption of Regulation 18550.1 - Independent And Coordinated Expenditures.

Commission Counsel Larry Woodlock stated that regulation 18225.7 explains the term, "made at the behest of." The proposed changes considered concerns presented by the Commission and members of the regulated community at the January 17, 2003 FPPC meeting. Staff was presenting similar modifications to proposed regulation 18550.1 for consideration if the Commission chooses to adopt a separate regulation to implement section 85500(b). Both regulations treat the concept of coordination in campaign spending, but proposed regulation 18550.1 is narrower in scope.

In response to a question, Mr. Woodlock explained that independent expenditures are a concern in a ballot measure election because the public has a right to know who is promoting or opposing ballot measures.

Chairman Getman noted that the issue is whether the contributor is truly independent of the ballot measure committee or candidate.

Commissioner Swanson questioned whether proposed regulation 18225.7 created any difficulties for Enforcement Division.

Enforcement Chief Steve Russo responded that the language is enforceable. He especially supported the inclusion of the concept of presumptions.

Mr. Woodlock explained that no modifications were proposed for 18225.7(a). Decision 1 addressed whether 18225.7(b) should be added to offer concrete examples that explain "cooperation," "consultation," and "coordination."

Commissioner Knox questioned whether a contribution made by a candidate was truly a "behesting" situation, and whether proposed subdivision (b)(1) was helpful.

Mr. Woodlock agreed that it stated the obvious, but noted that it is sometimes helpful to state the obvious in regulations.

Commissioner Knox observed that "at the behest" implies that a third party was involved and that (b)(1) was confusing.

Commissioner Downey questioned whether the purchase of a billboard by a candidate through the candidate's committee would be considered "at the behest."

Chairman Getman stated that the purchase would be "made by" the candidate, not "at the behest of," the candidate.

Mr. Woodlock noted that the language reads, "by or through the candidate or committee." He explained that "through" was an agency term and was copied from federal regulations, which he assumed to be for the purpose of catching the activities of agents. He noted that the phrase may be there to help prove agency.

Chairman Getman stated that an expenditure made through a committee could involve concepts such as earmarking, but not issues of behesting. She questioned whether the language was trying to carry those concepts into a behesting regulation.

Mr. Woodlock stated that he did not think the language was necessary.

Ms. Menchaca agreed, noting that earlier versions of the proposed regulation subdivision included the concept of "agent" to clarify what it would cover. Subsequent versions put the agency language in subdivision (f). The "or through" language could be viewed to include additional concepts other than "at the behest," and it would be appropriate to delete it.

Chairman Getman stated that an expenditure made by the candidate or by an agent of the candidate is simply made by the candidate and is not behested.

Ms. Menchaca stated that as long as the language in (f) was kept, (b)(1) could be deleted.

Commissioner Knox stated that "or through" was both redundant and misleading and favored its deletion.

There was no objection to deleting (b)(1).

Mr. Woodlock stated that he would make that change and change the enumeration accordingly.

Chairman Getman suggested that the language in (b)(1) be deleted, and that (b)(2) be added to (b), and that (b)(2)(A) and (B) become (b)(1) and (2).

Mr. Woodlock stated that 18225.7(c) proposes two additional presumptions.

Commissioner Knox suggested deleting the reference to "agents" in (c)(1) and (c)(2) because it is already covered in (f).

Chairman Getman stated that including the reference in (c) might argue that "agency" has a different meaning in that subdivision or that it is important only there and not important elsewhere. However, agency matters everywhere through the regulation.

Commissioner Knox suggested that any reference to "agent" should be deleted except for subdivision (f), and that the word "agent" should be deleted from (c)(1), and (c)(2) entirely.

Mr. Woodlock concurred.

Chairman Getman observed that proposed subdivision (c)(2) explicitly spells out the presumption that an expenditure made by an agent in the course of the agent's work is an expenditure made by the candidate. That provision may not be needed, but there may be value to restating it as a presumption since the language, "made by or through the candidate or committee," was being deleted. If an expenditure is made by an agent it is not, per se, done at the behest of a candidate, but there is a presumption that it is done at the behest of a candidate or the committee.

Commissioner Downey questioned whether Mr. Jones would have made an independent expenditure at the behest of a candidate if Mr. Jones is the treasurer of Mr. Smith's candidate

committee and makes a personal expenditure to put up a billboard in support of Mr. Smith's candidacy.

Chairman Getman responded that it would be presumed to be an independent expenditure "made at the behest of."

Commissioner Knox stated that he did not think it was a "behesting" situation.

Commissioner Downey responded that the question is whether it was made by the committee.

Mr. Woodlock stated that the question was whether the expenditure was made by the committee and whether it was made during the course and scope of the agent's duties on the committee.

Commissioner Downey stated that the burden to present evidence would be on the treasurer.

Chairman Getman agreed, noting that (c)(2) provides that if the expenditure is made in the course of the agent's involvement in the current campaign, it would be "behested," and therefore that section should be kept in the regulation.

Commissioner Downey noted that "course and scope" are also included in subsection (f). He noted that it would be important not to lose the presumption in his example.

Technical Assistance Division Chief Carla Wardlow pointed out that the situation presented was an excellent example of a scenario where a "behested" expenditure could fall between the cracks.

Commissioner Knox agreed that the scenario was one that should require reporting and attribution, but not as a "behesting" situation.

Chairman Getman stated that she did not believe the reporting and attribution would be required elsewhere in the regulations.

Ms. Wardlow stated that subsection (c)(2) would make it very clear.

Commissioner Downey agreed that (c)(2) should be kept for clarity purposes.

Chairman Getman questioned whether activity within 6 months prior to an expenditure should be included as a presumption in subsection (3)(a), and whether, "for the same campaign" should be changed to, "for the same election," in that subsection. She did not think the regulation should go that far because people commonly move positions after the primary but before the general election. Since campaign strategy changes dramatically after a primary, the primary and general elections should be treated as two different elections. She supported a concurrent employment presumption but not a serial employment presumption.

Mr. Woodlock agreed, noting that "campaign" is not as well defined as "election."

In response to a question, Mr. Woodlock explained that staff originally suggested a 12-month presumption for subsection (3)(A), then considered using the 90-day election cycle. Six months seemed like a reasonable compromise.

There was no objection to eliminating "serial employment" as a presumption of a "behesting" situation.

Chairman Getman stated that the phrase "campaign strategy or fundraising" in subsection (3)(A) should be changed to "campaign or fundraising strategy," for clarification purposes. She suggested that the sentence read, "The person making the expenditure retains the services of a person who provides the candidate or committee supporting or opposing the ballot measure with professional services related to campaign or fundraising strategy for that same election."

In response to a question, Mr. Woodlock stated that the proposal intended to address both a candidate or a ballot measure, and that there should be a comma after the word "candidate" in that sentence.

After further discussion, the Commissioners agreed to change the phrase in that sentence to, "provides either the candidate or the committee."

In response to a question, Mr. Woodlock stated that staff recommended deleting the language crossed out in (d)(1) because it would conflict with (d)(6).

Commissioner Knox asked what would happen if a candidate stated a need for 30,000 flyers in an area of the candidate's district during an interview, and the interviewer prints and distributes the flyer.

Mr. Woodlock responded that subsection (d)(1) would not apply in that case because the interview went beyond the discussion of the issues. The expenditure would be a behested payment under (c)(1). He noted that the safe harbor regulation was drafted fairly narrowly, and that additional circumstances beyond those in the safe harbor regulation would take the scenario outside the sope of the safe harbor regulation.

Chairman Getman stated that she was concerned about the use of the term, "past election" in subsection (d)(3). If a contribution is made to a candidate, it should not mean that the contributor cannot make an independent expenditure to the current election.

Mr. Woodlock and Ms. Wardlow agreed. Ms. Wardlow noted that the language would make it clear that the independent expenditure is allowed when a contribution was previously made, providing the next payment is truly independent of the candidate. She supported deleting the words, "in a past election."

There was no objection from the Commission to that change.

In response to a question, Mr. Woodlock explained that the bracketed language in (d)(4), (5) and (6) was in the last draft, but members of the public argued that people who consider offering support to a candidate or committee want to learn about the proposed strategy of the candidate or committee in order to ascertain that the ballot measure or candidacy is viable. They believed that the proposed language might deter that type of activity. If that language is eliminated, the remaining language may be sufficient.

Commissioner Swanson supported deleting the bracketed language because concerns were addressed in the rest of the regulation.

Commissioner Knox agreed. He asked how "public request" is defined.

Mr. Woodlock responded that he was not sure how to define it. A television or radio advertisement, or mailers received would obviously be public documents. One-on-one situations would not be public. He pointed out that this issue addressed a "safe harbor" provision, and persons with questions could call the FPPC for help. He believed that it would be futile to try and define "public" in the regulation.

Mr. Woodlock reminded the Commission that there had been a request to take the word "public" out of (d)(4), but that removing it would sanction the one-on-one interview and largely empty the regulation of meaning.

In response to a question, Ms. Wardlow stated that staff received a question involving a scenario where a candidate sent letters to 25 different organizations requesting support. She believed that there was either a file memo or an advice letter that referred to a general request for support or a non-specific request for support, and it indicated that neither situation would trigger a contribution if the organization receiving the request made an expenditure supporting the candidate. She suggested that "public" be changed to "general or non-specific."

Mr. Woodlock noted that the question of what "general or non-specific" means would arise. He argued that vagueness in marginal cases could be tolerated in a safe harbor provision. If "safe harbor" does not apply, it would not necessarily mean that coordination existed.

Chairman Getman supported the use of "general or non-specific."

Commissioner Downey observed that it could then include the one-on-one discussions.

Chairman Getman stated that it should not be considered coordination when a candidate standing outside the subway shakes hands with people passing by to ask for their support.

Mr. Woodlock agreed, but noted that he did not agree that safe harbor should be provided for that scenario if it meant that other one-on-one encounters were also included.

Chairman Getman observed that the one-on-one meetings of concern involved a specific request to a person or group.

Commissioner Knox supported the use of "general or non-specific."

In response to a question, Mr. Woodlock stated that both "general" and "non-specific" should be in the regulation because they were not necessarily synonymous.

There was no objection from the Commission to changing the word "public" to "general, non-specific" and to deleting the bracketed language in (d)(4), (5) and (6).

Commissioner Knox stated that the purpose of regulating "behesting" is to restrain coordination, and questioned why the term, "intends to make," in subsection (d)(6) was necessary. He did not agree that a safe harbor should be provided when a contributor is advising the campaign in advance of their intentions to donate, because it could open the door to coordination.

Commissioner Swanson agreed.

There was no objection from the Commission to the change.

Mr. Woodlock stated that the word "constituting" on page 3 line should be changed to "resulting in." Additionally, the language, "Title 2, California Code of Regulations, Section 18225," should replace the language, "regulation 18225," on page 3 line 6.

Ms. Wardlow questioned whether the language, "provided that there is no exchange of information," in subsection (d)(6) was still necessary.

Chairman Getman responded that it was necessary, because without it, a person making an expenditure could provide the candidate with non-public details about the expenditure which might result in the candidate changing their campaign plans.

Commissioner Knox suggested that "other" be inserted on line 24 of page 2, in subsection (d)(6).

There was no objection from the Commission.

Diane Fishburn, from Olson Hagel and Fishburn, presented a revised version of subdivision (e), clarifying that the regulation does not apply to exchanges between campaign committees, and to clarify that exchanges of information concerning two committees' separate expenditures do not constitute a contribution between those two expending committees.

In response to a question, Ms. Fishburn stated that if one of the two committees was candidate-controlled, subdivision (e) would not apply. She suggested that, where two primarily formed ballot measure committees exchanged information so that they did not duplicate their efforts to support a ballot measure, the expenditures would not be contributions to each other.

Commissioner Knox questioned whether the proposal would accomplish that. He explained that Government Code section 82044 defined "payment" as anything of value. If the two groups

exchanged polling results, which would be a thing of value, subdivision (e) would not exempt the payments made after the exchange of that information.

Ms. Fishburn agreed, noting that it is difficult to determine the value of polling and when the polling results are being shared.

In response to a question, Ms. Fishburn stated that she preferred her version of (e) because the staff version would provide that the exchange of information was not a contribution, but her version would provide that the subsequent expenditure following the exchange of information would not be a contribution. Additionally, candidate campaign committees would not be included in this section.

Chairman Getman observed that Ms. Fishburn's version is narrower because it excludes candidate-controlled committees. She asked whether there would ever be a situation where there were expenditures between ballot-measure committees.

Mr. Woodlock stated that they were trying to exclude the characterization of information exchanges not resulting in payments from being considered a contribution. Previous public testimony indicated that the committees like to communicate with each other regarding issues of common interest. They wanted to be able to continue those dialogues without being enmeshed in coordinated behavior.

In response to a question, Mr. Woodlock explained that sharing polling information would be considered a behested contribution. If two committees both support or oppose a ballot measure, the committee with less money might ask the committee with more money to take a poll on issues central to the ballot measure and then share the results of the poll with them. Staff would characterize that as an in-kind contribution.

Commissioner Knox questioned whether staff's proposed (e) would exempt the scenario described by Mr. Woodlock from being a behested expenditure.

Mr. Woodlock responded that the transfer of information from a poll would be considered a payment because it is an intangible object of value.

In response to a question, Commissioner Knox stated that it would be something of value under Government Code section 82044.

Ms. Fishburn responded that there are advisory letters that explain how to value polling information.

Chairman Getman asked whether it was clear that the request to conduct the poll falls under regulation 18225.7.

Mr. Woodlock responded that it was not the request to conduct the poll, but rather, the transferring of the valuable asset.

Ms. Wardlow observed that it would fall into the definition of "contribution," because it was a payment made directly at the request of a committee. She noted that part of the definition of "contribution" includes transfers between goods and services between committees.

Commissioner Knox stated that (e) would not identify as a behested expenditure the scenario described above, because it expressly exempts information resulting in a payment under Government Code section 82044.

Mr. Woodlock responded that in this case, the exchange of information would be the intangible asset of the poll data, resulting in a payment or in-kind contribution.

Ms. Fishburn suggested that the language, "so long as the exchange did not constitute a "payment" under Government Code section 82044," be deleted from her proposed (e). She did not believe that the subsequent expenditure following the exchange of information should be considered a contribution between the committees. She discouraged the Commission from using (e) to address exceptions to the definition of "contribution," or to address the established advice regarding when ballot measure committees make contributions to each other when coordinating ballot measure activities.

Mr. Woodlock stated that staff's (e) was more advantageous for that purpose because it did not use the word "contribution." Instead, staff referred specifically to whether an expenditure was made "at the behest of," which should help avoid the problems identified by Ms. Fishburn. Even if the last line of Ms. Fishburn's proposed (e) is cut off, Mr. Woodlock was still concerned that the transfer of polling information could fall under the "safe harbor" provision.

Ms. Fishburn questioned whether, if Committee A exchanges polling information with Committee B, all of Committee B's subsequent expenditures would then become contributions to Committee A. She noted that the question involved two general-purpose committees, not candidate-controlled committees, and established rules provide that giving a poll to another committee results in a contribution. The question is whether nature of the subsequent expenditures for communications changes.

Mr. Woodlock agreed that the transfer of the polling information results in a contribution, but if the last sentence in Ms. Fishburn's (e) is deleted, it would state a contrary rule.

Chairman Getman suggested that the language read, "Notwithstanding any other provision of this section, if two or more committees which are not candidate-controlled campaign committees have exchanged information concerning their expenditures, their subsequent expenditures shall not be considered made at the behest of each other," noting that the goal is to define, "made at the behest."

In response to a question, Chairman Getman stated that her proposal was different from the staff proposal because it does not address whether it is a contribution or a payment. It may still be a contribution if it falls under the definition of "contribution."

Mr. Woodlock remarked that it could be read as a license that, once two or more committees share information, nothing they do in the future will be considered "coordination."

Chairman Getman agreed, and questioned why coordination between committees is important. She stated that either draft would allow committees to talk to one another and it would not be "coordination."

Mr. Woodlock observed that the staff draft would not control future consequences as much.

Chairman Getman summarized that the staff proposal would provide that each information exchange was not "at the behest of," while Ms. Fishburn's proposal would provide that information exchanges are not behesting if it is between non-candidate committees.

Mr. Woodlock agreed that both proposals try to get to the same place, but Ms. Fishburn's proposal still has a prospective effect.

Chairman Getman questioned the difference.

Mr. Woodlock responded that he was not willing to rule out, in a general rule, the possibility that two committees can take actions that amount to expenditures at the behest of one another.

Chairman Getman pointed out that the staff proposal would do just that. Every time information is exchanged, under the staff proposal, it would not be a payment and would not be "at the behest."

Mr. Woodlock noted out that there are other kinds of conduct that would amount to "coordinated expenditures," and he was concerned that Ms. Fishburn's proposal could be read to provide that once information is exchanged, no matter what the committees do in the future it would not be considered coordination.

In response to a question, Mr. Woodlock did not agree that the regulation should say that the mere exchange of information between committees should not be "behesting," and that there is something different in exchanges of information between committees than when there are exchanges of information between a candidate and a committee. Staff wanted to allow information exchanges which do not involve payments without concluding that coordination exists and links subsequent expenditures.

Ms. Fishburn agreed, and suggested one limitation with regard to expenditures for communications made by the committee. When two committees both support the same candidate and, after consulting with each other, decide one will do a phone bank and one will send a mailer, she asked whether they were making independent expenditures in support of the candidate and contributions to each other. She did not think current advice would say that each committee made an independent expenditure. If one of the committees had also given the other committee polling data or paid the other committee's rent, they would have made contributions

to the other committee too. But the expenditures for the communications would have been independent, so it would be an independent expenditure for the candidate.

Ms. Fishburn stated that, under the scenario she described, the expenditures would be considered "made at the behest of that committee," unless the committee were limited to primarily-formed ballot measure committees instead of general-purpose committees.

Commissioner Swanson suggested that the word, "coordinated" could be inserted before the word, "exchange" in staff's proposal, page 2, line 29.

Ms. Fishburn responded that it would make clearer what is included in the conduct, but that the rest of the provision would provide that the information exchange was not a payment and therefore not a contribution. It would not deal with the independent expenditures then made by the committees.

In response to a question, Ms. Wardlow stated that when two ballot measure committees who support the same measure coordinate, they are not doing it to benefit each other, they are doing it in support of the ballot measure. The important information to the public is who made the payments to support the measure. It is different with candidates because they receive the benefit of the payment.

In response to a question, Ms. Fishburn stated that the key phrase in the statute is, "the affected candidate or committee." Ballot measures are different than candidate committees because contribution limits are not involved and the issue is disclosure and reporting. Independent expenditures usually involve general-purpose committees or individuals or businesses. There are often actual committees formed on either side of the ballot measure, and the question is primarily one of reporting and discerning whether there was coordination resulting in a reportable contribution.

Commissioner Downey stated that the regulation dealt with behested payments, and that reporting obligations and disclosures should not be of concern in this regulation.

Chairman Getman did not think that they could be separated, particularly with regard to a ballot measure committee. She discussed a scenario where a general-purpose committee and a union PAC both support the same candidate and work together to decide that one committee will do a poll and the other will do a mailer, and neither discusses it with the candidate. It should not be considered "behested" and whether they should be making contributions to each other should not be an issue. Both proposals take committees talking to each other out of the "behested payments" situation.

Commissioner Downey stated that (a) would keep them in unless the Commission changes it.

Chairman Getman agreed.

Ms. Menchaca suggested changing the beginning of staff's proposed (e) to read, "Notwithstanding any other provision of this section, an exchange between two or more committees of information not resulting in a "payment" under Government Code section 82044 to each other, …" thereby limiting the analysis to that particular exchange of information with regard to each other. It would not reach beyond further analysis of communications or activity.

In response to a question, Ms. Menchaca stated that it would apply to the exchange of information when it does not result in a payment both ways between committees.

Chairman Getman observed that Ms. Fishburn and Ms. Wardlow seemed to be supporting a broader interpretation. She suggested that the rule the FPPC was currently applying could be accommodated using Ms. Fishburn's language if it was slightly changed to read, "Notwithstanding any other provision of this section, if two or more committees which are not candidate-controlled campaign committees, merely exchange information concerning their expenditures, their expenditures shall not be considered "made at the behest" of each other."

Commissioner Downey noted that it would not be considered a "behested payment" even when two committees supported the same ballot measure and clearly coordinate their expenditure.

Ms. Wardlow agreed.

Commissioner Knox observed that the reason for that interpretation is because the committees are not the beneficiaries of the coordination, but rather the measure is the beneficiary.

Chairman Getman agreed, noting that it may still be a payment or a contribution, but it would not be done at the behest of one another.

In response to a question, Chairman Getman stated that not doing this would reverse advice that exchanges of information between committees is not "behested."

In response to a question, Mr. Woodlock stated that everyone was trying to avoid the situation where two committees communicate with each other and those communications are converted into contributions to each other.

Ms. Wardlow added that when the scenario where a PAC and a general-purpose committee make expenditures to support a candidate occurs, contribution limits come into play.

Chairman Getman stated she was concerned about whether they become contributions to each other.

Mr. Woodlock stated that it could amount to limitations on direct speech and communication.

In response to a question, Chairman Getman stated that independent expenditure committees could coordinate with each other in support of a candidate as long as they do not work with the campaign if this language is passed.

Mr. Woodlock noted that the question was whether they acted independently of the candidate. If it is independent, there would still be an independent expenditure.

In response to a question, Ms. Wardlow stated that there is a $25,000 limit to contributions to a political party for the support of state candidates.

Ms. Fishburn commented that their earliest suggestion was to limit the regulation to § 82031 and to independent expenditures, but not try to address all instances of "made at the behest of." If all committees are included, the Commission has to deal with existing statutory and regulatory exceptions to the definition of "contribution." She suggested that (b) could be limited to expenditures made at the behest of a candidate or ballot measure committee. There was a need to focus on when an expenditure is independent of a candidate or ballot measure committee in the regulation. She noted that (b) specifically refers only to communications, which are independent expenditures.

Chairman Getman stated that she was still comfortable with defining "made at the behest of" in all contexts.

Commissioner Knox suggested that staff's (e) could be changed to read, "Notwithstanding any other provision of this section, an exchange of information between two or more non-candidate controlled committees shall not be considered an expenditure made at the behest of those committees."

Mr. Woodlock stated that it does what it was intended to do, but it would not solve the problem of the poll information exchange.

Chairman Getman stated that they did not want to solve that problem in this regulation. She noted that Commissioner Knox's proposal would not answer whether it is a contribution or a payment from one committee to another.

Commissioner Downey added that it would not require that the expenditure be a contribution when it was made "at the behest of."

Chairman Getman agreed, noting that § 82015 would address whether it was a contribution.

The Commission adjourned for a short break at 11:10 a.m.

The Commission reconvened at 11:30 a.m.

Chairman Getman distributed a new draft of subsection (e), noting that the word "problem" in the first line should be changed to "provision."

Ms. Wardlow explained that the consensus seemed to be that the regulation should try to ensure that the exception be limited and allow two general-purpose committees to exchange

information. Additionally, it should ensure that two ballot-measure committees supporting or opposing the same ballot measure be allowed to share information and coordinate expenses as long as they are not actually exchanging goods or services, or transferring things of value to each other.

Chairman Getman noted that this was important because the reporting would be so complicated that it could become less helpful to the public.

Ms. Wardlow stated that it would result in reporting payments as both a contribution and as an independent expenditure. Reporting would become confusing for the committees, and something could get lost in the translation. She noted that the exchange of information between two committees (disregarding the issue of polling data, which would probably fall under the definition of "contribution") needed to address the subsequent expenditure, not the exchange of information. She suggested that Ms. Fishburn's draft (e) might work with some adjustments.

There was no objection to the goal of the regulation as outlined by Ms. Wardlow.

Ms. Menchaca stated that the newest draft (e) addressed exchanges, but questioned whether it addressed the subsequent payment.

Chairman Getman asked that staff bring revised language for regulations 18225.7 and 18550.1 back after the lunch break.

Mr. Woodlock explained that regulation 18550.1 would need numerous conforming changes.

Chairman Getman agreed.

Ms. Fishburn stated that she did not believe that the Commission needed to adopt a separate regulation for § 85500(b) if the independent expenditures issues are addressed in regulation 18225.7.

Commissioner Downey pointed out that § 85500(b) did not have the language, "made at the behest of," and regulation 18550.1 would help by defining it.

In response to a question, Ms. Fishburn stated that a separate regulation suggests that there is something different about expenditures made under the reporting requirement of § 85500. In an earlier draft she proposed making an express reference to § 85500 in regulation 18227.

Commissioner Knox asked what would happen if the express reference was not made and the additional regulation was not adopted, noting that the regulated community would then have to rely on the statutory language, with some assistance from regulation 18225.

Ms. Fishburn responded that the language of § 85500(b) is based on existing language in regulation 18225.7. If the regulation is being changed, the question becomes whether § 85500(b)

is a new and separate test. She supported having the explicit reference to the statute in 18225.7, with the same presumptions in 18225.7 applying for § 85500(b).

Commissioner Knox did not think it could be done with the reference.

Chairman Getman agreed, noting that express advocacy is necessary under § 85500, but not under all the situations covered in 18225.7 with "behesting." As long as the rest of the regulatory language is the same, the second regulation might make it clearer.

Mr. Woodlock agreed, and noted that a person might not find 18225.7 when looking for a regulation addressing § 85500.

Chairman Getman stated that staff would come back after lunch with conforming changes to both regulations and a new draft for subsection (e).

Commissioner Swanson asked staff to analyze whether regulation 18550.1 would duplicate item #9.

Item #7. Regulatory Calendar -Work Plan Revisions.

There were no questions or concerns from the Commission or the public about the proposed changes.

Chairman Getman noted that recall issues needed to be in a regulation and suggested that it be added to the calendar.

Item #8. Proposition 34 Fact Sheet – Recall Elections.

Senior Commission Counsel Hyla Wagner presented a revised fact sheet dealing with recall elections. She noted that the FPPC received several phone questions regarding recall elections, and it came to their attention that the recall fact sheet had not yet been updated to reflect changes to the law by Proposition 34.

Ms. Wagner explained that the Commission receives questions regarding whether contribution limits apply to the official who is the target of the recall election, as well as the candidates for the office should the recall succeed. Questions also arise regarding the filing obligations of candidates and committees involved in the recall.

Ms. Wagner stated that recall elections have the characteristics of both a ballot measure and a candidate election. The rules applicable under the PRA are different for those two types of elections. She discussed the definition of "measure," explaining that the recall election falls under that definition.

Ms. Wagner stated that voters are asked to decide whether the official should be removed from office and who should replace the official should the recall succeed. The state official who is the

target of the recall, under Proposition 34, does not have to abide by contribution or expenditure limits for the recall election. This is consistent with past FPPC advice. The proponents of the recall ballot measure are also not subject to contribution limits. She discussed ballot measure rules, noting that neither the proponents nor the opponents of a recall election are subject to limits. Replacement candidates in a state recall election, however, are subject to contribution and expenditure limits because they fit within the Act's definition of "candidate." Ms. Wagner compared the provisions of Propositions 73 and 208 with Proposition 34 provisions regarding recalls, noting that Proposition 34 made the rules clearer.

Ms. Wagner stated that the fact sheet also discussed the disclosure obligations of the candidates and committees involved in the recall.

Commissioner Knox commended the staff memorandum.

Commissioner Swanson agreed.

Chairman Getman moved adoption of the recall fact sheet.

Commissioner Downey seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

Chairman Getman reminded staff that a regulation should be developed.

Item #10. Proposed Decision in Four Consolidated Cases.

a. In the Matter of Fair Elections Group and Nikola Mikulicich, Jr., FPPC No. 98/148.

b. In the Matter of Liberty's Torch PAC, Sponsored by Young Americans for Freedom and Nikola M. Mikulicich, Jr., FPPC No. 98/763.

c. In the Matter of Californians Against Phony Election Reform and Nikola Mikulicich, Jr., FPPC No. 98/465.

d. In the Matter of Nikola Mikulicich, Jr., FPPC No. 00/86.

There were no questions or comments from the Commission or the public.

The Commission adjourned for closed session at 11:56 a.m.

The Commission reconvened at 1:15 p.m.

Chairman Getman announced that the Commission recommended the following corrections to the proposed ALJ decision during closed session:

In the Matter of Fair Elections Group: Nikola M. Mikulicich, Jr., Treasurer – Correct footnote #2 on page 3 of the proposed ALJ decision to read, "Pursuant to Government Code sections 82013(a) and 84214, and Title 2, Division 6 of the California Code of Regulations, section 18404(b) and (c).

In the Matter of Liberty's Torch Sponsored by Young Americans for Freedom: Nikola M. Mikulicich, Jr., Treasurer – Correct Legal Conclusion #5 on page 7 of the proposed ALJ decision, and the last line on page 10 of the decision to substitute "section 84103" in place of "section 82048.7."

In the Matter of Nikola Mikulicich, Jr. – Correct Factual Finding #16 on page 5 of the proposed ALJ decision by removing the word "respondent" where it appears before "CCRPAC." Correct Factual Findings #18, #19, and #20 by inserting, "through its Treasurer, respondent Mikulicich, Jr.," after "CCRPAC."

In response to a question, Mr. Russo stated that Enforcement Division had no objections to the changes, noting that they were non-substantive changes.

Chairman Getman announced that the ALJ decision was adopted by the Commission with the changes listed above.

Item #4. Adoption of Amendments to Regulation 18225.7 - Expenditures "Made At the Behest Of" a Candidate or Committee; Adoption of Regulation 18550.1 - Independent And Coordinated Expenditures.

Staff distributed a new proposed regulation 18225.7(e). There was no objection from the Commission to the new language.

Commissioner Downey questioned whether a general-purpose committee could work with a primarily-formed ballot measure committee, noting that it would not be covered under (e).

Ms. Wardlow responded that the subsequent expenditure from the two committees would be considered "made at the behest" of the primarily-formed committee, which would be appropriate.

Chairman Getman moved adoption of proposed regulation 18225.7 with the following changes:

1. Subdivision (b)(1) would be eliminated.
2. Subdivision (b) would read, "Expenditures "made at the behest" of a candidate or committee include expenditures made by a person other than the candidate or committee to fund a communication relating to one or more candidates or ballot measures "clearly identified" as defined at Title 2, California Code of Regs. Section 18225(b)(1), which is created, produced or disseminated.
3. Subdivision (b)(2)(A) would be changed to (b)(1).

4. Subdivision (b)(2)(B) would be changed to (b)(2).
5. Subdivision (c)(1) would read, "Based on information about the candidate's or committee's campaign needs or plans provided to the expending person by the candidate or committee, or"
6. Subdivision (c)(3)(A) would read, "The person making the expenditure retains the services of a person who provides either the candidate or the committee supporting or opposing the ballot measure with professional services related to campaign or fundraising strategy for that same election, or"
7. Subdivision (d)(3) would read, "The person making the expenditure has made a contribution to the candidate or committee, or"
8. Subdivision (d)(4) would read, "The person making the expenditure is responding to a general, non-specific request for support by a candidate or committee." The bracketed language would be deleted from the proposed subdivision (d)(4).
9. The bracketed language would be removed from (d)(5).
10. Subdivision (d)(6) would read, "A person informs a candidate or committee that the person has made an expenditure, provided that there is no other exchange of information not otherwise available to the public relating to details of the expenditure,"
11. Subdivision (e) would read, "(e) Notwithstanding any other provision of this section, if two or more committees exchange information between or among themselves, subsequent expenditures by each committee shall not, merely by reason of that exchange, be considered to be made "at the behest" of the other committee(s), where the committees are (i) all general purpose committees, (ii) all committees primarily formed to support or oppose the same candidate or candidates, or (iii) all committees primarily formed to support or oppose the same measure or measures.
12. The language in subdivision (f) reading, "regulation 18225" would be replaced by, "Title 2 California Code of Regs. Section 18225."

Commissioner Knox seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

Mr. Woodlock explained that the following conforming changes would be necessary in proposed regulation 18550.1:

1. Change subdivision (b)(3) to read, "The person making the expenditure retains the service of a person who provides the candidate with professional services related to campaign or fundraising strategy for that same election, or".
2. Change subdivision (c)(3) to read, "The person making the expenditure has made a contribution to the candidate, or"
3. Change subdivision (c)(4) to read, " The person makes an expenditure in response to a general, non-specific request for support by a candidate provided that there is

no discussion with the candidate prior to the expenditure relating to details of the expenditure, or"

4. Change subdivision (c)(5) to read, "The person making the expenditure has invited the candidate to make an appearance before the person's members, employees, shareholders, or the families thereof, provided that there is no discussion with the candidate prior to the expenditure relating to details of the expenditure, or"
5. Change subdivision (c)(6) to read, "The person making the expenditure informs the candidate that the person has made an expenditure, provided that there is no other exchange of information, not otherwise available to the public, relating to details of the expenditure, or".

Chairman Getman moved adoption of regulation 18550.1 with the changes listed by Mr. Woodlock.

Commissioner Swanson seconded the motion.

Commissioners Downey, Knox, Swanson and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

Item #5. Adoption of Regulation 18754 - Conflict of Interest Regulations: Financial Disclosure; Members of Boards or Commissions of Newly Created Agencies.

Commission Counsel Ken Glick explained that this proposed regulation will implement § 87302.6. It will require disclosure for individuals newly assuming office who make or participate in making decisions for their agency prior to being included in their agency's conflict of interest code. The new legislation requires that they file Statements of Economic Interests (SEI's), on an interim basis, just as those individuals who file under § 87200. Mr. Glick explained that the new rule has the potential of requiring more extensive disclosure than may be required once officials file under their agency's code.

Mr. Glick noted that the phrase "a member of a board or commission in a newly created agency" is not defined elsewhere in the statute, the PRA or in FPPC regulations. Therefore, it will be difficult for some individuals and code reviewing bodies to know whether there is a filing obligation. He explained that the legislative history of the statute illustrated that the intent was to distinguish between high-ranking individuals who collectively make decisions, and staff. The high-ranking individuals must comply with the interim filing requirement. Mr. Glick explained that proposed subdivision (a)(1) clarifies that filing obligation.

Mr. Glick explained that the Act's existing definitions provide that newly created boards and commissions linked or not linked to any agency are "newly created agencies," and Decision 1 of the staff memorandum asks whether members of a newly created board or commission linked to an existing agency are also subject to the new filing requirements. Staff recommended that they be required to file, because the Act provides that all boards and commissions constitute agencies, regardless of whether they are linked to another agency. If they were excluded, they could make

or participate in making decisions without reporting potential disqualifying conflicts of interest, which the legislation intended to remedy.

Mr. Glick explained that Decision 1 incorporates the Act's definitions of "state agency" and "local government agency." In doing so, a stand-alone board or commission can be defined as a "newly created agency". For instance, a personnel commission for a school district would be a local government agency and its members would have filing obligations.

Chairman Getman suggested that the language of subdivision (a)(2) be changed to begin, "For purposes of § 87302.6," and suggested deletion of the language, "Including, but not limited to, a state office, county, city or district of any kind including school district, or any other local or regional political subdivision, or any department, division, bureau, office, board, commission or other agency of the forgoing," because the language was already included in the statute.

Ms. Menchaca noted that if the language is deleted, and the government code is amended, the Commission would not have to amend the regulation.

There was no objection from the Commission to defining "newly created agency" as proposed by staff with the two corrections suggested by the Chairman.

Mr. Glick explained that Decision 2 concerned who is to file with regard to the effective date of the new statute. He warned that the Commission was constrained to avoid retroactive regulation. Decision 2 considers including language that would apply the section only when the newly created agency came into existence on or after January 1, 2003. If the Commission believes that § 87302.6 applies to all members of boards and commissions who are not yet reporting under an approved conflict of interest code, they should not adopt the language in Decision 2.

Mr. Glick noted that staff received a comment suggesting that, if the language of Decision 2 is not adopted, the language of (a)(2) would need to clarify that a member of a board or commission of any agency that is not yet subject to reporting under a code is required to file an SEI under the statute.

John McKibben, Deputy Executive Officer for Los Angeles County Board of Supervisors, speaking on behalf of the Clerk of the Board of Supervisor's, explained that they are the filing office for about 2,000 public officials, and that they do the conflict of interest code review analysis for about 267 agencies. He believed that SB 1620 did not intend to cover agencies created prior to January 1, 2003. He also believed that there would be confusion for the few agencies going through code adoption procedures. The disqualification provisions of the Act provided safety during the gap of time for those few individuals not making economic disclosure prior to their agency's adoption of a code. Mr. McKibben stated that it would only be a problem of short duration, because the new agencies that have not yet adopted a code in Los Angeles County will probably have their codes in place by the time the regulation takes effect.

In response to a question, Mr. McKibben stated that the code review process has been initiated, and the officials understand that the code has yet to be reviewed and approved by the Board of

Supervisors. It would be confusing to require full disclosure now, and then file again, under the different disclosure requirements of the new code, which should be completed very soon.

Chairman Getman noted that applying the regulation to people in agencies created prior to January 1, 2003, even those who were not in office on January 1, 2003, would clearly be a retroactive application of the statute.

Mr. Glick responded that it was not intended to cover people who were in office before January 1, 2003, but did not continue in office after January 1, 2003.

Chairman Getman noted that the Commission did not know how much of a problem would be created by the gap in filing deadlines.

Commissioner Downey opined that, for that reason, it might be a good idea to include the pre-January 1, 2003 officials. He explained that there may be agencies that do not yet have their code in place, and may not have them in place for some time. He saw no problem with requiring that they file SEI's within 30 days through this regulation.

In response to a question, Ms. Wardlow stated that staff would have to notify cities and counties of the new rules, and they would notify their new boards and commissions of the new filing obligations.

In response to a question, Ms. Wardlow stated that she did not think that the Commission was mandated to notify cities and counties, but thought it would be the right thing to do because people would be in jeopardy of being in violation of the Act.

Mr. McKibben pointed out that the Los Angeles Board of Supervisors is not always aware of newly created agencies, and could not notify them of the change.

Chairman Getman stated that, without a list of newly created agencies, she was uncomfortable requiring SEI filings within 30 days.

In response to a question, Mr. Glick stated that, if the proposed regulation was adopted at the meeting, it would go into effect in April, 2003.

Ms. Menchaca stated that officials would have 30-45 days to comply.

In response to a question, Mr. McKibben stated that newly created agencies are currently working on their codes, and the regulation would require additional work to produce filings that will be different than the ones they are developing.

Chairman Getman observed that an official who began serving on January 2, 2003 would need to be covered.

Mr. Glick agreed, and proposed substitute language that would remove "January 1, 2003," and would substitute, "the effective date of this regulation" to apply the transitional filing requirement to members who began serving on or after January 1, 2003, but before the effective date of the regulation.

Mr. Glick explained that the State Board of Education was created in the 1850's, but new commissions keep being added to it. Those would be newly created commissions of an existing agency.

In response to a question, Mr. McKibben stated that there are about 2-6 newly created agencies in Los Angeles County per year. He believed the filing deadline gap to be a relatively small problem.

Commissioner Swanson suggested that the existing agencies could be notified that the new regulation existed and that they could then notify any new agencies created under them. Commissioner Swanson understood that it created more work for them, but did not see it as an insurmountable job.

Mr. McKibben agreed, but thought it was both unnecessary and an incorrect reading of the statute.

In response to a question, Ms. Wardlow stated that a newly created agency must adopt a conflict of interest code within 6 months of its creation, and, if it is to be incorporated into an existing agency's code, then the amendment process is supposed to take 90 days.

Chairman Getman observed that the issue involved those rare instances where an agency had not adopted a code.

Mr. Glick stated that the legislative history discussed that issue, and wanted those officials to file on an interim basis during that code review process, which takes a year to 18 months to complete.

Chairman Getman agreed that it was a good policy for agencies created on or after January 1, 2003, because they are informed of the rule when the agency is formed. However, for officials and clerks of agencies formed before January 1, 2003, it could create a hardship, especially considering that they will have their own code in a very short time.

Commissioner Knox stated that he saw no public policy problem with defining a new agency as any agency created after January 1, 2003.

Commissioner Swanson noted that, if it becomes a problem, the Commission could revisit the issue.

Commissioner Downey stated that, if a very small percentage of the regulated community slips through a loophole, it did not weigh very heavily against the inconvenience and possible

"sandbagging" of people. He noted that the statute provided that officials of an agency created after January 1, 2003 have 30 days to file pursuant to the statute.

There was no objection to including the bracketed language of Decision 2.

Mr. Glick explained that the Decision 2a language was still relevant if it was rewritten to apply to members serving in office prior to and after the effective date of the regulation. It would pick up the time between January 1, 2003 and the effective date of the regulation.

Ms. Menchaca explained that if a new agency was created February 1, 2003, its new members who assumed office that day would have 30 days to file their SEIs. However, the new members may not have known about the obligation. The Decision 2a language would give them an additional 30 days beyond the effective date of the regulation. Ms. Menchaca believed that the officials should have known about their filing obligation, but, to be equitable, the Commission might want to give 30 days from the effective date of the regulation to everyone.

Commissioner Downey asked whether the statute precluded that because it states that they must file within 30 days of assuming office.

Chairman Getman stated that they may not have known where to file in February.

Ms. Wardlow stated that the Commission decided to include new boards and commissions of existing agencies in Decision 1. Prior to their decision, this was not clear to many people. In the example of the commission that was created under the Board of Education, those commission members might not have known that they were covered by the new statute because the concept of "new agency" was not known, and they thought that they would file once the agency's conflict of interest code was amended to cover their new commission.

In response to a question, Ms. Menchaca stated that the statute gave the Commission flexibility.

Chairman Getman stated that she was still uncomfortable with the language, "prior to and after January 1, 2003."

Ms. Menchaca stated that it could work, based on the Commission's decision to strike "serving in office prior to and after January 1, 2003."

Commissioner Swanson noted that staff recommended using "effective date of this regulation," instead of "January 1, 2003."

Ms. Menchaca suggested the following language for (b)(1)(A), "Every member of a governing board or commission of a newly created agency that has come into existence or has been determined to be an agency on or after January 1, 2003 shall file an assuming office statement within 30 days of the effective date of this regulation."

In response to a question, Mr. Glick stated that an this would only apply until such time as the official is required to file under the agency's code.

Mr. McKibben observed that Decision 1 provided that any commission is an agency for purposes of the Act, but Decision 2a does not reconcile with that in its language "or has been determined to be an agency." In the example of the personnel commission of a school district, their Board of Supervisors would treat the personnel commission as a sub-unit of the school district and would be subject to being amended into the school district code. Under § 87301, the code reviewing body has the right and obligation to determine at what level the code adoption process will be decentralized.

Ms. Menchaca responded that for purposes of promulgation and adoption of codes, § 87301 refers to an agency in a different manner because "at the most decentralized level" could refer to a division. It is not the same definition of "agency" in terms of encompassing it for disclosure and conflicts and other purposes. Those members would still be subject to making immediate disclosure even though they are not treated as an agency for purposes of adopting a conflict of interest code.

Chairman Getman stated that they would be treated as part of another agency. She noted that the language "or has been determined to be an agency" could be removed. If it falls in the definition of "agency" and it comes into being on or after January 1, 2003, the official has a filing obligation until there is a code.

Mr. McKibben noted that there are commissions that do not have any authority to affect financial interests.

Chairman Getman responded that they are covered under a different section.

Ms. Menchaca stated that there would be no problem removing the language "or has been determined to be an agency." One reason it was included was to cover entities that were uncertain as to whether they were an agency. Without that language, those entities would have to assume that they are agencies that have come into existence.

Commissioner Knox stated that he did not support making a predicate that there had to be some determination for the application of this section.

Chairman Getman summarized that (a)(2) would read, "For purposes of § 87302.6, "newly created agency" means any state agency or local government agency, as defined in Government Code sections 82003, 82041, and 82049, which has come into existence on or after January 1, 2003," and (b)(1)(A) would read, "Every member of a governing board or commission of a newly created agency that has come into existence on or after January 1, 2003, shall file an assuming office statement within 30 days from the effective date of this regulation."

Commissioner Knox did not agree that the filing should be 30 days from the date of the regulation.

Chairman Getman suggested that it be changed to, "30 days from assuming office or 30 days from the effective date of this regulation, whichever is earlier."

Mr. Glick suggested that the language read, "…on or after January 1, 2003, but before the effective date of this regulation, shall file…"

Chairman Getman stated that (b)(1)(A) would then read, "Every member of a governing board or commission of a newly created agency that has come into existence on or after January 1, 2003, but prior to the effective date of this regulation, shall file an assuming office statement within 30 days from the effective date of this regulation." The conforming change of Decision 2a would then be included.

There was no objection from the Commission.

Mr. Glick explained that Decision 3 offers the Commission the options of filing (option a) where the § 87200 filers file or (option b) file where code filers file. Staff recommended option b to keep it simple.

There was no objection to Decision 3 option b.

Chairman Getman moved adoption of regulation 18754 with the changes discussed.

Commissioner Knox seconded the motion.

Commissioners Knox, Downey, Swanson and Chairman Getman voted "aye." The motion carried by a vote of 4-0.

Item #6. Adoption of Regulation 18702.5 - Public Identification of a Conflict of Interest for Section 87200 Filers.

Ms. Menchaca announced that this regulation was being presented under the new "fast track" policy. It involved a number of technical issues, and staff was asking for guidance on a few major policy issues. The regulation would need to come back for adoption.

Commission Counsel Galena West corrected an error in appendix 1 of the staff memorandum, deleting the language on line 1.

Ms. West distributed a comment letter from Mike Martello, of the League of California Cities.

Ms. West explained that the proposed regulation provided guidance for the application of § 87105, created by AB 1797 (Harman). The Commission opposed the bill, but it was passed and became law on January 1, 2003. It requires that § 87200 filers (including the Governor, Controller, City Council members and Planning Commissioners) who have a financial interest in a decision publicly identify that financial interest, recuse himself or herself, and leave the room.

Commissioner Swanson pointed out that it did not apply to the Legislators who passed the law.

Ms. West reported that this law was in contrast to existing requirements for other public officials found in regulation 18702.1. She explained that the Commission considered mandatory identification of the conflict of interest on two other occasions, and concluded during its Phase 2 project that identification of the conflict of interest should be permissive, not mandatory. Since there are two different rules for identification of a conflict of interest, as well as other gaps in the statute, it became necessary to develop a regulation.

Ms. West explained that Decision point 1 addressed whether the statute applied only in public meeting settings, or also during staff level discussions. Subdivision (b)(1) of the proposed regulation would limit the scope to meeting settings. She discussed the statute, noting staff's interpretation that the language appeared to contemplate meeting settings for its application. She explained that the Assembly Committee on Elections, Reapportionment and Constitutional Amendments analysis identified a possible problem when an official who may not even plan to attend a meeting would still have to identify financial interests. However, the legislative committee analyses did not contemplate the notion of identifying those interests in other than a meeting setting. Staff recommended inclusion of (b)(1) to limit the scope to meeting settings.

There was no objection to confining the application of the regulation to meetings at which the official is present.

Commissioner Knox noted that he favored option C.

Ms. West explained that the statute limits its terms to a public official who holds an office specified in § 87200, which could be interpreted different ways. Staff presented options A and B in response to public concerns over whether the regulation would apply at all times. Decision point 2 addressed the options, and Ms. West illustrated the three options with an overhead presentation. As an example, she pointed out that the State Controller is on over 50 boards and commissions in addition to the Board of Control. Under option C the regulation would apply to all of the boards; option A would apply only to Board of Control meetings; option B would apply to both the Board of Control and the California Victim Compensation and Governor's Claims Board because of the Controller's ex-officio capacity on that board.

Chairman Getman noted that, under option B, the Controller would be the only official on the California Victim Compensation and Governor's Claims Board who had to operate under the identification rules of the proposed regulation.

Ms. West agreed, noting that it was a problem.

Ms. West stated that staff recommended option C because it was the broadest and most closely conformed with the statute's definition of "holds the office." The first two options focused on whether the public official functions at meeting of a board or commission listed under § 87200, or at a meeting because of the official's § 87200 office. Alternatively, she suggested that, no

matter what capacity the official is acting in, the official could be required to follow the identification obligation. Option C would require that the official has the identification obligation at any meeting, any time, any place.

Commissioner Knox agreed with option C because the other two options were too unwieldy for the official.

Chairman Getman thought option C was more unwieldy than option A from a general counsel's point of view, noting that it would be difficult to counsel a board or commission under option C, because option C would create different rules for different officials.

Commissioner Swanson noted that so many people would be outraged by option C that it might result in legislative action to change the rule.

Commissioner Knox stated that a general counsel would be aware of the board member's obligations.

Ms. West noted that the comment in regulation 18702.1 would allow local agencies to make their own rules regarding leaving the room.

Chairman Getman clarified her concern, noting that a general counsel would have to deal with two sets of rules when counseling a board or commission.

Commissioner Downey observed that § 87105 provided a "bright line" test. Without it, he questioned what added burden the general counsel would have when advising the § 87200 official.

Chairman Getman responded that it just seemed silly to have two different sets of rules. However, since the whole statute seemed silly, it might be best to support Commissioner Swanson's recommendation.

There was no objection from the Commission to option C.

Ms. West explained that Decision point 3 addressed whether the identification requirement can be made in writing as well as verbally. Staff recommended oral identification only.

Commissioner Knox noted that if it was written instead of stated orally, the information may not be circulated quickly, and he supported an oral identification approach because it was more efficient.

Commissioner Downey also supported the oral presentation, remarking that the purpose of the statute was to inform the public about the extent and nature of the conflict.

There was no objection to limiting the conflict identification to an oral presentation.

Ms. West explained that Decision point 4 addressed how a public official might participate in a meeting as a member of the public when they are required to leave the room after identifying a conflict. She stated that letters from the public suggested that the official could stand behind a partition set up in the room. Staff recommended that the public official be required to leave the room.

Commissioner Downey suggested that the word "by" on page 2 line 23 of the proposed regulation be changed to "and," so that the public official must recuse and leave the room instead of recuse by leaving the room.

Ms. West explained that subdivision (c)(4) revisited Decision point 3, and staff recommended that the identification be limited to oral presentations only.

Chairman Getman noted that, for closed sessions, the person would not even go into the meeting. The announcement would have to be made before going into the closed session.

Commissioner Knox pointed out that it may seem like a silly procedure, but it is the same procedure required for open session.

Chairman Getman stated that it presented the practical problem of identifying a conflict in a confidential matter. She questioned whether it should allow oral or written identification. Minutes of closed sessions are kept separately, and it may be appropriate to have the identification noted in the minutes of the meeting.

Commissioner Knox questioned whether the written disclosure would be part of the closed session or made available to the public.

Chairman Getman responded that it would be part of the closed session record and not be made public.

Assistant General Counsel John Wallace stated that this had been discussed in Interested Persons meetings, and that, since closed session meetings were generally opened in open session, the public would be able to hear about the conflict at that portion of the meeting.

Commissioner Knox explained that the disclosure of the conflict in open session might compromise the confidentiality of the closed session.

Chairman Getman presented an example whereby she would have to recuse herself from a litigation matter because she may have represented the respondent in another legal matter in a previous job. If she had to specify the name of the respondent in open session, the confidentiality of the closed session matter would be compromised.

Ms. West suggested that the closed session rule provide that the level of disclosure for closed session be less specific by requiring that the public official simply state that he or she has a conflict and will not participate.

Commissioner Downey stated that the statute requires that confidentiality be maintained on closed session items, while this new statute requires that the conflict be publicly identified. He suggested that the regulation address that conflict by including language that would provide that the prevailing statute be the closed session confidentiality statute, and that the disclosure be included in the minutes of the closed session.

Commissioner Swanson questioned whether the closed session needed to be addressed. A 5-member board and its legal counsel would know the regulation as it pertains to matters in open session. The person with the conflict would excuse themselves from the room. She was concerned that the regulation may be over-reaching.

Ms. Menchaca agreed that staff could look at the issue more closely for closed session. The general rule required that the source of the conflict be named, but it may not be necessary in closed session. The statutes may be in conflict, and it may not be appropriate to be that specific with regard to closed session situations.

Chairman Getman stated that the overriding consideration of the Commission is that nothing in the statute should abrogate the confidentiality of closed session.

Ms. Menchaca stated that the statute gave the Commission the flexibility to tailor something and that staff would work to develop the language.

Ms. West discussed the language in proposed regulation 18702.5(c)(1)(B), noting that the public official would only have to disclose the type of economic interest in closed session under that proposal.

Chairman Getman responded that the disclosure required under that proposal may still be too much to retain confidentiality, noting that the public does not have the right to know the subject matter of some closed session matters, and for very good reasons.

Chairman Getman pointed out her concern that consent calendar exceptions should be reworked, noting that a consent calendar often involved a single vote, and the commissioner with a conflict will clarify that they are not voting on a particular item. If the item is pulled from the consent calendar, then it is no longer a consent calendar.

Ms. West explained that Decision point 5 addressed absent public officials under subdivision (d)(2), and considered whether absent officials should be exempt from the regulation, and, if so, asks which officials and when.

Chairman Getman stated that the Commission already decided that issue.

Commissioner Downey noted that an official who does not want to disclose a financial interest could quietly slip out of a meeting before the discussion of an item, then return after the discussion.

Commissioner Knox stated that the clear policy of the law would prohibit an official from walking out of a room to avoid the discussion, and the official has a duty to disclose the conflict before leaving the meeting. He suggested deletion of the language "when the item is considered, or absent" on page 3, line 17, so that only the official who is absent from the entire meeting is exempt from the identification requirements.

Ms. West explained that staff discussed this extensively because it seemed to create a loophole, but noted a number of unavoidable situations, such as illness, where an official might have to leave the room.

Chairman Getman noted that an official might arrive to the meeting late due to a delayed flight, and would not be able to make the conflict identification at the time of the discussion, suggesting that the official would then be in violation of the statute.

Ms. West noted that the public would notice when an official left the room, which might deter officials from trying to avoid the identification obligation.

Chairman Getman suggested that the exception be allowed when the official is absent for any reason other than the fact that they have to recuse themselves for a conflict.

Commissioner Swanson questioned the need for the section on absences, because the purpose of the law was to prohibit the official from voting on a matter that is perceived to be or is a real conflict of interest. If the person leaves the room, the person will not participate, and that is the goal of the rule. She saw no benefit to the general public.

Chairman Getman pointed out that the Commission made that argument when they opposed the statute. However, it passed anyway because the Legislature thought that the identification was necessary.

In response to a question, Commissioner Knox stated that his proposed change to the language provided that the official with the delayed flight would still be obliged to disclose the conflict if the official arrived at the meeting late.

Commissioner Swanson stated that the official could simply say that their plane did not land and therefore they did not have a conflict.

Commissioner Knox suggested that, if (d)(2) is eliminated, the law would require that an official in attendance would have to identify their conflict, and that it might be the best solution. However, the problem of avoiding the disclosure by walking out would still exist.

Commissioner Downey suggested that, if staff's proposed language is kept, other remedies could take care of the official who leaves the room to avoid their identification obligation.

Commissioner Knox agreed with Commissioner Downey.

Ms. West explained that Mike Martello, from the League of California Cities, sent a letter stating that public officials should not be required to speak, because the statute allows the official to listen to the meeting as a member of the general public. Staff believed that the plain reading of the new statute created an obligation to speak in order to stay in the meeting.

Chairman Getman stated that the regulation could not force someone to speak. The official has a right as a member of the public to be in the meeting. Often the official will not know ahead of time whether he or she will speak on an issue.

Ms. West explained that a member of the public was concerned that through omitting any reference to the exception for members of the Legislature, there could be confusion. Staff could include it in (d)(4) of the exceptions list.

Chairman Getman did not support that suggestion.

Ms. Menchaca stated that staff would bring the regulation back to the Commission in May for consideration.

Item #9. Staff Memorandum Regarding "Express Advocacy".

Mr. Woodlock stated that two recent California Appellate court decisions affected § 82031 and regulation 18225(b)(2), dealing with independent expenditures and express advocacy. He explained that the law in this area developed largely in federal courts. The *Furgatch* opinion has guided the Commission in this area, even though it was under attack by other jurisdictions. The *Schroeder* opinion was issued a year ago, regarding the construction and application of § 82031 and regulation 18225(b)(2). The *Davis* decision was recently denied review by the state Supreme Court.

Mr. Woodlock stated that the *Davis* court rejected *Furgatch* as wrongly decided, and found that § 82031 and regulation 18225(b)(2) were constitutional, but only if they were interpreted narrowly and did not follow *Furgatch* into error. He reported that the public reaction to that decision urges the Commission to cease enforcing provisions that mirrored the objectionable provisions of *Furgatch*. However, Mr. Woodlock believed that *Davis* expressly upheld the constitutionality of § 82031 and regulation 18225(b)(2) so long as they were properly construed. Staff was asking the Commission whether the recent state court decisions might justify a change in the Commission's interpretation of the rules.

Chuck Bell, from Bell, McAndrews, Hiltachk and Davidian, stated that he recently submitted and then withdrew an opinion request with regard to this issue. He stated that staff's excellent memo gave direction but also raised problems. He suggested that the regulation and the statute be amended to limit the definition in § 82031 consistent with the *Davis* opinion. Pending cases in the courts may warrant waiting on final action. The *Shays-Meehan* case will likely have Supreme Court review which may further delay resolution of the issue. He noted that the Commission was not bound to wait, but agreed that it was probably advisable to do so.

Mr. Bell observed that the *Davis* opinion did not refer to the Proposition 34 description of "issue advocacy" in § 85310, and does not necessarily involve express advocacy. This may cause more problems.

Chairman Getman opined that the most confusing aspect of the *Davis* decision was that, while the court said external factors may not be considered, it clearly considered the timing of the election.

Mr. Bell responded that *Furgatch* was confusing. He explained that some years ago a regulation was proposed redefining "express advocacy" and providing a specific cutoff date before an election. The regulation was considered and rejected. Mr. Bell has taken a guarded approach, advising clients that language not containing express words of advocacy could still become problematic as the election nears.

Commissioner Knox asked Mr. Bell whether he believed *Davis* conflicts with the language, "taken as a whole unambiguously urges a particular result in an election," in regulation 18225(b)(2).

Mr. Bell agreed, noting that the *Schroeder* court stated that "taken as a whole" does not mean reference to external circumstances. The only external circumstance he could think of was an election.

Chairman Getman stated that external circumstances could mean looking at the context of an entire advertisement, even though there is not one word with express advocacy in the advertisement.

Mr. Bell responded that if the "magic words," or something like them, were not in the advertisement, it would not be express advocacy. He stated that many issue advertisements avoid a call to action in order to avoid express advocacy.

Commissioner Knox asked whether Mr. Bell thought that *Davis* was rightly decided, and if it would have been rightly decided if it reached the same result if the election had been the day after the advertisement ran. He noted that the advertisement in question did not have "magic words" like "defeat Gray Davis."

Mr. Bell responded that *Davis* said there needed to be a protected area for issue-related speech. He noted that the federal statute does not have a "magic words" requirement and that it prohibits corporations and other labor union groups using prohibited federal money from advocating on issues right up to the election. He believed that a bright line is better, and noted that the Supreme Court thought that in *Buckley*. Other federal courts, except *Furgatch*, agreed.

Commissioner Knox provided examples of express advocacy language, noting that the advertisement must urge some kind of voting action to be considered express advocacy.

Mr. Bell agreed, adding that *Buckley* drew a line and that was better for protected speech. He discussed the dilemma it presented for campaign reform.

Chairman Getman asked whether an advertisement contained express advocacy if it simply said that an incumbent was doing a lousy job, but the background included a picture of a voting booth with a recall "Yes or No" symbol. She asked whether the internal context of the advertisement could be considered express advocacy, or whether only the words can be considered when trying to determine if the advertisement contained express advocacy.

Mr. Bell responded that the *Davis* decision says it is just the words that can be considered. He was sure that the court, facing both visual and oral text, would take into account a visual test that might have a check mark. The "magic word" would be inferred.

Chairman Getman noted that the *Davis* decision would not allow that, but *Furgatch, Schroeder* and *Buckley* would allow it. Since it was clearly permissible under *Buckley*, she questioned how to proceed if *Davis* had the wrong interpretation of the federal constitutional limits.

Mr. Bell stated that *Davis* should be viewed in line with *Buckley*. If the Supreme Court concludes, in the *Shays-Meehan* case, that a different constitutional line would apply, that should be dealt with then. He believed that *Davis* follows *Buckley* and that if nothing else occurred, it would be appropriate to amend the statute and the regulation to eliminate the external context factor.

Chairman Getman stated that the timing of an election should be an exception.

Mr. Bell responded that the language should include fairly explicit words of action even if timing was taken into account.

Chairman Getman stated that *Davis* took timing into account to confirm that, even if it sounded like "magic words," it could not possibly be express advocacy because there was no election.

Mr. Bell stated that the court was explicit about the legal standard.

Chairman Getman pointed out that it did not follow that legal standard.

Commissioner Knox questioned how the regulation could be rewritten to make it more consistent with *Davis* and *Schroeder*, since the statute would then conflict with the regulation.

Mr. Woodlock stated that a Legislative amendment could be sought. However, since the ruling does not specify external or internal context, he believed that the regulation could be left as it is, but just read to mean internal context. He believed that internal context is well supported by the Supreme Court. Alternatively, the regulation could be amended to make that explicit. He saw no immediate conflict between the regulation and the statute.

Ms. Menchaca stated that the Commission could wait to see if the court addresses the issue in *Pro Life*, or staff could research and prepare proposed language to present to the Commission in May, 2003.

In response to a question, Ms. Menchaca stated that the regulatory calender includes this item.

Commissioner Knox stated that regulation 18225(b)(2) should be reviewed since the Commission is bound by *Davis*.

In response to a question, Mr. Woodlock stated that the *Pro Life* and *Bipartisan Campaign Reform Act* cases may impact this issue.

Chairman Getman pointed out that they may not matter, since the Commission is bound by *Davis* and *Schroeder*. Even if the Supreme Court rules they are wrong, a new decision in California would have to be awaited.

Mr. Woodlock stated that there are still questions about what *Davis* says on some crucial issues.

Chairman Getman urged staff to bring back a regulation that would address the context and timing issues so that Enforcement staff will know how to proceed.

Commissioner Knox pointed out that the regulated public would also know how to proceed.

Commissioner Downey agreed that a regulation should be pursued.

Chairman Getman asked staff to present a regulation at the May meeting addressing the issues. She suggested that it might be better to wait and see how the Supreme Court will rule before pursuing a statutory change. In the meantime, a more narrow construction could be construed, as the courts have done.

Items #11, #12, #13, #14, and #15.

There being no objection, the following items were approved on the consent calendar:

Item #11. ***In the Matter of TransCore, Inc., FPPC No. 01/559.*** (1 count.)

Item #12. ***In the Matter of Ron Holmes, FPPC No. 00/373.*** (2 counts.)

Item #13. ***In the Matter of Andrea L. Hooper, the Committee to Elect Andrea L. Hooper and Ethel Pacheco; FPPC No. 02/187.*** (1 count.)

Item #14. ***In the Matter of United Faculty of Grossmont-Cuyamaca PAC and Melvin Amov; FPPC No. 00/595.*** (4 counts.)

Item #15. Failure to Timely File Late Contribution Reports - Proactive Program.

a. ***In the Matter of ACS State & Local Solutions, FPPC No. 2002-1016.*** (1 count.)

b. ***In the Matter of Henry M. Buhl, FPPC No. 2002-1021.*** (1 count.)

c. ***In the Matter of Catterton Partners IV Management Company, FPPC No. 2002-1023.*** (1 count.)

d. ***In the Matter of Michelle Coppola, FPPC No. 2002-1024.*** (1 count.)

e. ***In the Matter of Holt of California, FPPC No. 2002-1032.*** (1 count.)

f. ***In the Matter of G. Bradford Jones, FPPC No. 2002-1033.*** (1 count.)

g. ***In the Matter of Mark Kvamme, FPPC No. 2002-1034.*** (1 count.)

h. ***In the Matter of Los Angeles Homecare Workers Union Local 434-B, FPPC No. 2002-0791.*** (5 counts.)

i. ***In the Matter of Lennar Partners and Affiliated Entities, FPPC No. 2002-1037.*** (1 count.)

j. ***In the Matter of W. Howard Lester, FPPC No. 2002-1038.*** (1 count.)

k. ***In the Matter of MJM Wilshire Partnership, FPPC No. 2002-1040.*** (1 count).

l. ***In the Matter of John Nickoll, FPPC No. 2002-1041.*** (2 counts.)

m. ***In the Matter of Rose Klein & Marias, LLP, FPPC No. 2002-1036.*** (2 counts.)

n. ***In the Matter of Melissa K. Seifer, FPPC No. 2002-1046.*** (2 counts.)

Item #18. Litigation Report.

Chairman Getman announced that the Sacramento Superior court upheld the FPPC opinion in the *Hanko* matter that commission income can be a source of income for conflict of interest purposes.

Item #17. Legislative Report.

Executive Director Mark Krausse reported that nothing was moving in the legislature.

Item #16. Executive Director's Report.

Executive Director Mark Krausse had no additional business to report.

The meeting was adjourned at 3:20 p.m.

Dated: May 9, 2003.

Respectfully submitted,

_____
Sandra A. Johnson
Executive Secretary

Approved by:

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Chairman Randolph